

***United States Court of Appeals  
for the Second Circuit***



**JOINT APPENDIX**





76-6147

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

-against-

VARIOUS ARTICLES OF OBSCENE MERCHANDISE,  
SCHEDULE NO. 1350,

Defendants in Rem,

FRED CHERRY,

Claimant-Appellant.

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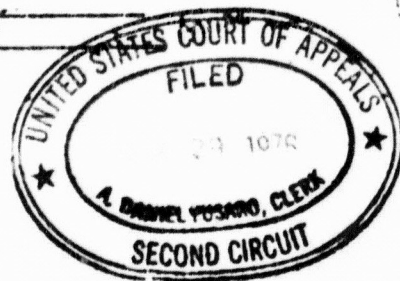
APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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JOINT APPENDIX

ROBERT B. FISKE, JR., ESQ.  
Attorney for Appellee  
Post Office Address  
One St. Andrew's Plaza  
New York, N.Y. 10007

FRED CHERRY  
Claimant-Appellant, pro se  
Post Office Address  
Post Office Box 1017  
Brooklyn, N.Y. 11202



PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

1. Docket Entries.....	1a-3a
2. Letter of Fred Cherry, dated 4/7/76.....	4a
(Note: This letter appears in the Record on Appeal attached to the back of Document # 5)	
3. Order postponing trial to 6/10/76.....	5a
4. Letter of Fred Cherry, dated 6/5/76.....	6a, 6b
(Note: This letter and the following letter appear in the Record on Appeal in the Stipulation, which is part of the Third Supplement to the Record on Appeal)	
5. Letter of Victor J. Zupa, dated 6/8/76.....	6c, 6d
(Note: See note for previous item)	
6. Transcript of proceedings on 6/10/76.....	7a, 7b
7. Transcript of proceedings on 6/22/76.....	8a-61a
8. Final Judgment.....	62a, 63a

DIST/OFFICE	DOCKET YR NUMBER	FILING DATE MO DAY YEAR	J	N/S	O	R	R 23	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR NUMBER
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PLAINTIFFS

UNITED STATES OF AMERICA

DEFENDANTS

VARIOUS ARTICLES OF OBSCENE  
MERCHANDISE SCHEDULE 1350

CAUSE

forfeiture of obscene merchandise

sls

ATTORNEYS

U.S. Atty's. Office

pro-se claims

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IF CASE WAS  
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FEB 18 1976

FILING FEES PAID

RECEIPT NUMBER

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C.D. NUMBER

STATISTICAL CARDS

CARD DATE MAILED

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76 Civ. 791 USA VS VARIOUS ARTICLES OF OBSCENE MERCHANDISE WEINFELD, J.

DATE	NR.	PROCEEDINGS
02-18-76	1	Filed complaint and issued summons.
03-02-76	2	Filed plaintiffs affdvt. of mailing of notice.
03-02-76	3	Filed WARRENT FOR ARREST OF OBSCENE ARTICLES and Marshals returns of service and publication.
03-18-76	4	Filed CLAIM OF OWNERSHIP, ANSWER and jury demand by Fred Cherry pro-se 603 Miramar Ave., San Tursi, Puerto Rico 00907 <span style="float: right;">FC</span>
04-05-76	5	Filed claimant pro-se Fred Cherry's memorandum and notice of motion for severing and consolidation with 73 CIV 4146 MEL. (no date)
04-01-76	6	Filed the following Claims & ANSWERS: Jay Wells, Box 812, Appleton, WI. 54911 Jerry J. Ukrin, 12700 Lake Ave., Lakewood, Oh. 44107 Carl W. Trompeter, 1402 Willow St., Lebanon, Pa. 17042 Charles A. Tealh, 40-23 Main St., Flushing, NY 11354 Bill Street, Rt. 1, Box 129, Prossner, Wa. 99350 L. Schlumbrecht, 1421 Marshall #8, Houston, Tx 77006 Joseph Sounders BTCS, USS Dale c/o FPO NY 09501 John W. Rutter, 721 N. Scott St., Wilmington, De. 19805 George L. Potter, Box 76, Holland Patent, NY 13354 Dr. Hugh W. Payton, 416 Jupiter, Washington, C.H., O.H. 43160 Slawomir Kuczynski, 385 McLean Ave., Yonkers, NY 10705 B. Karbar, 16 Easton Ave., New Brunswick, N.J. 08901 Murray Kahl, 125 Devon Rd., Belmar, NY 12058 Larry Henry, Box 87, Corsico, Pa. 15029 R.A. Gerhart, 260 W. Schuylkill Rd., Portstown, Pa. 19464 George Dusha, Box 771, El Cerrito, Ca 94530 Larry B. Christopher 426 Bellevue East #2, Seattle, Wa. 98102 T. Coni, 3674 Friar Rd., Philadelphia, Pa. 19154 James Buonamici, 135 Chestnut Lane 111 J, Richmond Hts. Oh. 44133 Leo Berry, Rd. 4, Circleville, Oh 43113 Carlos Aloy, 1455 Jesup Ave. # 1A, Bronx, NY 10452 Rachid Ali, 38 W. 31st St., NYC 10001 Fred Cherry, 603 Miramar Ave., San Tursi, Puerto Rico 00907 and all pro-s JOSEPH D. FERA, 21 Priscilla Av., Providence, R.I. 02909
04-07-76	7	Filed Partial Default Judgment and order that the defendant articles remaining in the custody of the US Marshal for which no claim has been made are condemned and forfeited to the pltf. Further ordered that US Marshal is directed to destroy merchandise and make his return according to law. -- Weinfeld, J. -- Judgment entered - Clerk.
04-08-76	7	Filed pltf's affdvt. of Victor J. Zupa in opposition to motion #5.
04-05-76	8	Filed plaintiffs notice to claimants.
04-12-76	==	NON JURY TRIAL BEGUN and concluded - Judgment to be submitted. The Court finds articles obscene with the exception of merchandise claimed by Mr. Fred Cherry who is <u>severed from this action and will proceed to trial on June 10, 1976.</u> The severance is granted subject to further adj. by the court. -- Weinfeld, J.
04-13-76	==	Filed memo endorsed on document #5: Claimants motion for severance granted. Motion for consolidation is moot, since the latter action was dismissed on 2-20-76. -- Weinfeld, J. m/n
04-21-76	9	Filed order that the trial of the claimed goods is adj. to 6-10-76-- Weinfeld, J.



76 CIV 791 ~~434~~

USA v. Various Angeles

D. C. 110 Rev. Civil Docket Continuation

D. C. 110 Rev. Civil Docket Continuation		PROCEEDINGS		(except claims by F. Cherry)	Date Order or Judgment Noted
DATE					
04-20-76	10)	Filed Final judgment and order that the articles/are forfeited and condemned as obscene and that the US Marshal make his return according to law. Weinfield J. Judgment entered.			CLERK
<del>04-20-76</del>	<del>NY</del>	<del>Filed transcript of record of proceedings dated 2-19-76.</del>			(Error See 75 Civ 6532)
06-02-76	12	Filed Pltff's. requested jury instructions.			
06-02-76	13	Filed Pltff's. trial memorandum.			
06-04-76	14	Filed transcript of record of proceedings dated 4-12-76.			
06-22-76	---	Before Cooper, J. Jury trial begun & concluded. Jury verdict for Pltff. Material obscen.			
7-13-76		Filed Judgment. Ordered dftn. Exhibit 7 & 7A etc. addressed to claimant Fred Cherry is condemned & forfeited to pltff. & no sooner than 60 days of this Judgment U.S. Marshls. destroy as indicated, etc. Cooper J. Judgment Entered 7-13-76. <del>XXXXXXXXXXXX</del> Clerk, Entered 7-20-76. (mailed notice)			
07-15-76		Filed copy of judgment filed on 4-30-76 with Marshals return - merchandise destroyed on 7-2-76.			
06-29-76		Filed copy of partial default judgment filed on 4-7-76 with Marshals return - merchandise destroyed on 6-9-76.			
09-10-76		Filed Claimant's (Fred Cherry) notice of appeal from the final judgment entered on 7-13-76. (mailed notice)			

**BEST COPY AVAILABLE**

4/7/76

Re: U.S. v. Articles; 76 Civ. 791 (EW)

Judge Edward Weinfeld  
United States Courthouse  
Foley Square  
New York, N.Y. 10007

Sir:

I have just received (today) a notice informing me that the trial in this action is scheduled for April 12, 1976. I hereby request postponement of said trial on the grounds that my health does not permit me to be in New York at the present time. I will return to New York approximately the beginning of June and I therefore request that the trial of this action be postponed until July in order to give me sufficient time to prepare for trial. I hereby specifically waive my constitutional right to have the trial concluded within 60 days of the commencement of this action, because, if I were not present at the trial, I would lose the more basic constitutional right of the opportunity to be heard.

I would also remind you that I have a motion for severance and consolidation pending. Also, note that I have demanded a trial by jury. I have never heard of such a thing as an ex-parte trial by jury.

Very truly yours,

*Fred Cherry*  
Fred Cherry  
603 Miramar Avenue  
San Tursi, Puerto Rico 00907

cc: Victor J. Zupa  
Assistant U.S. Attorney  
U.S. Courthouse  
Foley Square  
New York, N.Y. 10007

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA, :

Plaintiff, :

-v- :

Various Articles of Obscene :  
Merchandise, Schedule No. 1350, :

Defendant. :  
-----X

O R D E R

76 Civ. 791 (EW)

WHEREAS, a trial having been held on April 12, 1976  
as to certain materials seized as obscene by plaintiff,  
and

WHEREAS, Fred Cherry (the "claimant") having filed  
a claim and answer as to certain materials alleged to be  
obscene by plaintiff, and

WHEREAS, the claimant has requested a postponement  
of the trial as to certain material (the "claimed goods"),  
and

WHEREAS, the claimant has waived the requirement  
that these proceedings be concluded within sixty (60) days  
after commencement,

NOW THEREFORE, upon the request of claimant it is  
hereby

ORDERED that the trial as to the claimed goods be  
adjourned to June 10, 1976 at 10 A.M. in Room 1305 of the  
United States Courthouse, Foley Square, New York, N.Y.;  
provided, however, that said adjournment date shall be sub-  
ject to further adjournments by the court as the Court shall  
deem necessary.

Dated: New York, New York  
April , 1976.

United States District Judge



June 5, 1976

Judge Irving Ben Cooper  
United States Courthouse, Foley Square  
New York, N.Y. 10007

Re: U.S.A. v. VARIOUS ARTICLES, etc., 76 Civ. 791 IBC

Sir:

Please refer to the previous correspondence in this action, in particular my letter of 5/21/76, addressed to Judge Weinfeld, and your answer to said letter, dated 5/28/76.

I arrived at Kennedy Airport from Puerto Rico at 4:00 P.M. on the afternoon of June 2nd. Immediately upon my arrival I phoned Asst. U.S. Attorney Zupa and arranged to inspect the items which are the subject of this action on June 3rd. Let me emphasize that this was the first opportunity I had to inspect said items, since the statute under which this action is proceeding, namely 19 U.S.C. 1305, permits a claimant to examine his property only in the district in which it was seized. While inspecting said items, I asked Mr. Zupa if he knew the name of the official in the Customs Bureau who had viewed the motion picture film "SENSATIONS", and who had made the ultimate decision to allow its importation. Mr. Zupa informed me that he did not have this information. Therefore, I must now request a postponement in order that I may serve written interrogatories on the plaintiff to obtain this information in order to subpoena this official for the trial.

Let me explain the significance of this information and why it is necessary for me to obtain the testimony of this official. I viewed the motion picture film "SENSATIONS" last autumn and now after having viewed the items in the present action, I am of the opinion that "SENSATIONS" is more "obscene" than the items in the present action. I am of the opinion that the Customs Bureau employs a double standard in deciding whether or not an item is "obscene". That is, I believe that a commercial importer, represented by a lawyer, is permitted to import items which would not be allowed in the case of a person importing for private use, unrepresented by a lawyer. I am of the opinion that the Customs Bureau has established a standard of obscenity by allowing the importation of the motion picture film "SENSATIONS", and that it would be a constitutional violation to allow the Customs Bureau to hold other importers to a stricter standard.

Let me point out that I could not have prepared interrogatories until after viewing the articles in the present case, because I did not know whether said articles were or were not comparable to certain motion picture films. For example, I did not know, until after viewing the material in the present action, that said material is not comparable to another imported motion picture film, namely "EXHIBITION".

I will need 45 days from the time of your approval of my request. I will need one week to prepare interrogatories, 30 days for the plaintiff to answer said interrogatories, and another week to prepare and serve a subpoena, after I find out whom I will need to subpoena.

Very truly yours,

Fred Cherry  
Claimant, pro se  
Post Office Address  
Post Office Box 1017  
Brooklyn, N.Y. 11202

cc: Victor J. Zupa, Esq.  
Asst. U.S. Attorney  
One St. Andrew's Plaza  
New York, N.Y. 10007

VJZ:wp

BY-HAND

June 8, 1976

Honorable Irving Ben Cooper  
United States District Judge  
United States Court House  
Foley Square  
New York, New York 10007

Re: United States v. Various Articles, etc.,  
76 Civ. 791 (I.B.C.).

Dear Judge Cooper:

Responding to Mr. Cherry's letter of June 5, 1976, in which he seeks a postponement of the trial as to the materials he claims, it is the position of the United States that Mr. Cherry has shown no reason for this trial to be delayed.

First, the sole issue in this case is whether the material claimed by Mr. Cherry is obscene. That issue is to be decided by the jury requested by Mr. Cherry who will apply the community standards.

Secondly, contrary to Mr. Cherry's statement, Customs has advised that it has not approved the importation of the film Sensations and therefore any postponement to determine the Customs official who approved it, is unnecessary.

Finally, Mr. Cherry has previously raised the issue and charged that Customs applies a double standard in determining obscenity which favors the commercial importer represented by counsel, United States v. Various Articles of Obscene Merchandise Schedule No. 1117, 74 Civ. 4014 (CBI). Since Mr. Cherry relies here on the film Sensations which Customs did not approve, Mr. Cherry has shown no basis for his charge of a double standard.

Thus, no reason has been shown for a delay in the trial of this action. The only issue to be determined is whether or not the materials Mr. Cherry claims are obscene.

VJZ:wp

Honorable Irving Ben Cooper

- 2 - June 8, 1976

This issue should be determined by the jury since one has been demanded.

Very truly yours,

ROBERT B. FISKE, Jr.  
United States Attorney

By:

VICTOR J. ZUPA  
Assistant United States Attorney  
Telephone: 212-791-1975

cc: Fred Cherry  
Post Office Box 1017  
Brooklyn, New York 11202

Fred Cherry  
Hotel Bossert  
Hicks and Montague Streets  
New York, New York 11201

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----X  
4 UNITED STATES OF AMERICA,

5 vs.

6 VARIOUS ARTICLES OF OBSCENE  
7 MERCHANDISE, Schedule No. 1350.  
8 -----X

9 B e f o r e :

10 HONORABLE IRVING BEN COOPER,

11 District Judge.

12  
13 New York, New York,  
14 June 10, 1976.

15 A p p e a r a n c e s :

16 ROBERT B. FISKE, JR., United States Attorney for  
17 the Southern District of New York  
18 VICTOR J. ZUPPA, ESQ., Assistant U. S. Attorney,  
19 of Counsel.

20  
21 FRED CHERRY, The Respondent, Pro Se.  
22  
23  
24  
25



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(In open court, Court not present.)

MR. RICHARD LIND: My name is Richard Line. I am the Judge's law clerk, and the other law clerk, Richard Marmaro, is also here. I have an announcement to make on behalf of Judge Cooper.

Judge Cooper denies in all respect Mr. Cherry's application embodied in his letter of June 5, 1976, for the reasons set forth in the Government letter of June 8, 1976. Trial in this matter is scheduled for Tuesday, June 22, 1976, at 1 p.m. in Courtroom 307. The matter will be disposed of at that time.

Mr. Cherry, you received a copy, did you not, of the Government's letter of June 8 responding to your letter of June 5?

MR. CHERRY: I show you a copy of a letter I received, and you can --

MR. LIND: Yes, that is the letter. You received a copy? You have read it?

MR. CHERRY: Yes.

(Adjourned to Tuesday, June 22, 1976, at

1:00 p. m.)

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----X  
:  
UNITED STATES OF AMERICA :  
:  
vs :  
:  
VARIOUS ARTICLES OF OBSCENE :  
MERCHANDISE, Schedule No. 1350. :  
:  
-----X

76 Civil 791

New York, N. Y.

June 22, 1976 - 1:00 p.m.

Before

HON. IRVING BEN COOPER,

District Judge,

and a Jury.

APPEARANCES:

ROBERT B. FISKE, JR., Esq.,  
United States Attorney for the Southern District  
of New York

VICTOR J. ZUPA, Esq.,  
Assistant United States Attorney

MR. FRED CHERRY,  
Claimant, Pro Se.

---

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3 THE CLERK: United States of America versus Various  
4 Articles of Obscene Merchandise.

5 Is counsel for the Government ready?

6 MR. ZUPA: Government is ready, your Honor.

7 THE COURT: Mr. Cherry, who is this gentleman with  
8 you?

9 MR. CHERRY: I want him to assist me, your Honor.  
10 He is not an attorney.

11 THE COURT: That's all right.

12 MR. CHERRY: Your Honor, may I bring up the points  
13 raised in my letter --

14 THE COURT: Not now. We are going to empanel a jury  
15 now.

16 (A jury of six was duly empaneled and sworn.)

17 (In the robing room:)

18 THE COURT: Now, what is it that you want to call  
19 to my attention, Mr. Cherry?

20 MR. CHERRY: Well, the first matter I want to call  
21 to your attention is that I had a trial a year ago, and at  
22 that time the Government witness said something about the mail  
23 being addressed to me in Puerto Rico, and I think that is  
24 prejudicial and irrelevant, and I would like the assistant  
25 United States Attorney not to mention that, and I ask that  
the envelope not be included in the trial.



1 MP

2 THE COURT: What does the Government have to say?

3 MR. ZUPA: I would like to ask why Mr. Cherry asks  
4 that.

5 MR. CHERRY: The jury may suspect I am a commercial  
6 importer. They may feel that I have a vagabond life style.  
7 They may object to my life style, and it is entirely irrelevant.  
8 It can only be prejudicial, and it has no probative value of  
9 any sort.

10 MR. ZUPA: Well, Mr. Cherry can state on direct  
11 examination that it is for his own personal use and not for  
12 commercial use. The other point --

13 THE COURT: Where was this material mailed to?

14 MR. ZUPA: Puerto Rico.

15 THE COURT: I take it that it was addressed to  
16 Mr. Cherry there.

17 MR. ZUPA: Yes, your Honor.

18 THE COURT: Well, the Government would have to re-  
19 veal that. It would have to show it was mailed from so and  
20 so to so and so.

21 MR. CHERRY: Can I concede that, to avoid that  
22 coming into the case?

23 MR. ZUPA: I think it would be acceptable if we say  
24 the material was mailed within the United States, but there  
25 is one point in addition about the envelope. I asked Mr.

1 MP

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2 Cherry the other day to stipulate that there is a fourteen-  
3 day requirement from the time that the mail is seized to the  
4 time that we commence our action. The envelope has a post  
5 mark of February 6th. That would mean that any date after  
6 that in which we seized it had to have satisfied the fourteen-  
7 day requirement, because we commenced our action on February  
8 18th, and Mr. Cherry has not so stipulated, and I would ask  
9 him to do so if he wants us to withhold the envelope.

10 MR. CHERRY: If I have to do that, I will, but how  
11 about cutting out the address?

12 THE COURT: No. He just said, will you concede  
13 that the material --

14 MR. CHERRY: Well, if I have to, I will, to avoid  
15 the envelope getting before the jury -- if it is necessary.

16 THE COURT: Well, it is necessary, because he has  
17 to begin within fourteen days, and if he hasn't got a date,  
18 how can he prove that point?

19 MR. CHERRY: Well, it is not a question of when it  
20 was mailed. It is a question of when from the time it was  
21 seized to the time the action was commenced.

22 Isn't he going to have a witness for that, anyhow?

23 THE COURT: Do you feel that you can concede that  
24 the date when it was seized --

25 MR. CHERRY: Aren't they going to testify to that?

MP

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MR. ZUPA: We plan to put in evidence the date of the seizure, but the post mark says February 6th.

MR. CHERRY: I am not sure it says that.

THE COURT: Well, I want to protect you, but I have to give the Government a chance to be heard.

MR. ZUPA: I think, anyway, your Honor, that the Government would ask that the issue whether the fourteen-day requirement has been met be decided by your Honor rather than the jury. If that is agreeable to you, the envelope won't have to go to the jury, because it would be only your Honor who sees the post mark.

THE COURT: That is fair enough. I will look at the envelope, and if I find it bears a certain date, and if I find the seizure was within fourteen days thereof, the point is settled.

You look intelligent and sound intelligent and seem to understand everything that is going on.

MR. CHERRY: Well, I do go to a law library.

THE COURT: What else do you want to point out?

MR. CHERRY: Two items involved here.

Now, is it agreeable to the Government that I voluntarily consent to the forfeiture of the advertising material and just bring the magazine to the jury? Is that agreeable to the Government?

1 MP

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2 MR. ZUPA: I think that is agreeable to the Govern-  
3 ment.

4 THE COURT: That's fine, Mr. Cherry. You are doing  
5 very well.

6 MR. CHERRY: The advertising material will kill me.  
7 If I were on the jury, I would find for the Government.

8 THE COURT: Well, that is fair.

9 MR. ZUPA: I state, your Honor, that the Government  
10 will only submit the magazine, "Sexual Instruction by Susan"  
11 to the jury and that Mr. Cherry has conceded that the illus-  
12 trated advertisement is obscene on its face and subject to  
13 seizure and forfeiture by the United States Government.

14 THE COURT: Is that right?

15 MR. CHERRY: Yes. I would also like to add the  
16 fact that I did not order the advertising material. I  
17 ordered the magazine, and the advertising material was includ-  
18 ed in the envelope without any knowledge and consent on my  
19 part.

20 MR. ZUPA: Your Honor, I think Mr. Cherry is trying  
21 to say that the material --

22 MR. CHERRY: I am trying to protect myself from a  
23 criminal indictment, among other things.

24 MR. ZUPA: If that is the sole purpose, we have no  
25 objection. If Mr. Cherry wants to protect himself from

1 MP

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2 criminal proceedings, we have no objection.

3 THE COURT: What is it you are going to put in?

4 MR. ZUPA: A magazine of twenty pages?

5 MR. CHERRY: Who has it? It's outside.

6 THE COURT: Come along. Don't waste time.

7 MR. ZUPA: It's a twenty-page magazine, "Sexual  
8 Instruction by Susan".

9 THE COURT: What about the advertising?

10 MR. ZUPA: Part is illustrated advertisement.

11 THE COURT: You are not putting that in?

12 MR. ZUPA: He has consented to a forfeiture of that  
13 material.

14 MR. CHERRY: That's correct.

15 THE COURT: That will not go before the jury.

16 MR. ZUPA: There is other material, consisting of  
17 order blanks, which were in the envelope addressed to Mr.  
18 Cherry, which is also subject to forfeiture.

19 MR. CHERRY: I don't concede that the order blank is  
20 subject to seizure. I don't concede that, not at all.

21 MR. ZUPA: Your Honor, the statute says that if the  
22 material is determined to be obscene, any of the other materi-  
23 als in the envelope are also subject to forfeiture.

24 THE COURT: Well, that is a matter of law.

25 MR. ZUPA: That's correct.



1 MP

8

2 THE COURT: But you are not going to refer to the  
3 order blanks before the jury.

4 MR. ZUPA: That's correct.

5 THE COURT: You are not going to introduce that in  
6 evidence.

7 MR. ZUPA: Are you conceding that that was for-  
8 feited?

9 MR. CHERRY: Well, now --

10 THE COURT: Wait a minute. Don't be irritated.  
11 Number one, you don't want the jury to hear this, and he says,  
12 no, the jury will not, but he is leaving it to the Judge to  
13 determine whether as a matter of law those order blanks were  
14 justifiably seized. That is all he is asking.

15 The main thing you are interested in is what goes  
16 before the jury; isn't that so?

17 MR. CHERRY: Yes.

18 THE COURT: So he says, do you concede that the  
19 order blanks were justifiably seized, and you are not laying  
20 any claim on that score.

21 MR. CHERRY: Your Honor, I do not, and I have a  
22 citation for that.

23 THE COURT: All right. What is your citation?

24 MR. CHERRY: United States versus 18 Packages of  
25 Magazines, 227 F. Supp. 198, and that case specifically says

1 MP

9

2 that if there are two items in the same package and one is  
3 obscene, it is only the obscene one which is subject to for-  
4 feiture, in spite of what the law seems to say.

5 THE COURT: All right. I will take that. What  
6 is the name of the case?

7 MR. CHERRY: United States versus 18 Packages of  
8 Magazines, 227 F. Supp. 198.

9 THE COURT: All right. I will look at it. It is a  
10 matter of law, and the jury doesn't have to hear this, and  
11 I will decide it between now and the time the case goes to  
12 the jury.

13 MR. CHERRY: Under Rule 51, I am supposed to have  
14 an opportunity to object to any items in the charge.

15 THE COURT: That will come later.

16 MR. CHERRY: After the charge is given?

17 THE COURT: Yes.

18 MR. CHERRY: I thought Rule 51 says I have a right  
19 to object before.

20 THE COURT: You can submit requests to charge before,  
21 but objections --

22 MR. ZUPA: Objections can be made by Mr. Cherry out  
23 of the hearing of the jury, after the charge is given.

24 MR. CHERRY: It also says --

25 THE COURT: Wait a minute.

1 MP

2 MR. ZUPA: It might be, your Honor, before the  
3 charge is given. I don't have the rule before me.

4 THE COURT: You take a look at it. I don't think  
5 there is any objection to his seeing it. It might be a  
6 good idea to let him take a look at it, since he is not re-  
7 presented.

8 All right. We will let you look at it.

9 MR. ZUPA: Your Honor, he has had our requests to  
10 charge --

11 MR. CHERRY: I know your requests.

12 Is that what you are going to charge the jury with:  
13 with his requests?

14 THE COURT: I am trying to be helpful to you, Mr.  
15 Cherry, but if you are going to sound irritated, you are going  
16 to make it difficult for all of us.

17 MR. CHERRY: I am sorry. I have a nervous -- I am  
18 just a little nervous.

19 THE COURT: Don't be nervous. Just listen to me.

20 MR. CHERRY: It's just nervousness.

21 THE COURT: You have been through this before. You  
22 have had many cases.

23 MR. CHERRY: Two, your Honor.

24 THE COURT: Before a jury, two?

25 MR. CHERRY: Yes.



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2 THE COURT: And Judge Weinfeld was the judge?

3 MR. CHERRY: Yes.

4 THE COURT: And was he not also the judge in one  
5 of the cases without a jury?

6 MR. CHERRY: He was the judge in the case that was  
7 transferred to you.

8 THE COURT: Yes, but wasn't there another case before  
9 the judge? Have you had a case involving obscene material  
10 that went before a jury?

11 MR. CHERRY: I have had two.

12 THE COURT: Right in this courthouse?

13 MR. CHERRY: Yes.

14 THE COURT: Will you tell me the names of the judges?

15 MR. CHERRY: Judge Motley and Judge Weinfeld.

16 THE COURT: So you have been through this.

17 MR. CHERRY: Well, the procedure was different be-  
18 tween two judges.

19 THE COURT: What is the difference between the two  
20 judges?

21 MR. CHERRY: Well, Judge Weinfeld didn't give me any  
22 opportunity to see the charge beforehand, and Judge Motley  
23 did.

24 THE COURT: You see, it is purely a matter of dis-  
25 cretion; and Judge Weinfeld, I would like you to know, is one

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2 of the greatest trial judges in the United States of America.  
3 I wish I had one hundredth of his capacity.

4 At any rate, this judge, Judge Cooper, is going to  
5 let you see the charge.

6 What else do you want?

7 MR. CHERRY: That's all, except an opportunity to  
8 object to the charge.

9 THE COURT: Well, what would be the purpose of  
10 showing it to you? Just to have you read it? Of course, if  
11 you object to it, you should say you object, and don't  
12 hesitate at any time.

13 Now, do we understand each other?

14 MR. CHERRY: I believe we do.

15 THE COURT: Is there anything from the Government

16 MR. ZUPA: No.

17 THE COURT: Then let's go on.

18 Does the Government intend to make any opening re-  
19 marks?

20 MR. ZUPA: Just very short.

21 THE COURT: You have the right to say anything you  
22 wish as the opening remarks. You can only address them to  
23 the merits of the matter; that's all. Do you understand that?

24 MR. CHERRY: Yes.

25 THE COURT: It is a very brief period of time that

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2 is allotted for that purpose.

3 You know what I mean by opening remarks. Did you  
4 have opening remarks before Judge Motley?

5 MR. CHERRY: Yes.

6 THE COURT: How much time did you spend?

7 MR. CHERRY: I really didn't time myself.

8 THE COURT: About how long?

9 MR. CHERRY: Two or three minutes.

10 THE COURT: Very well. And before Judge Weinfeld?

11 MR. CHERRY: About the same time.

12 THE COURT: All right, gentlemen.

13 (In open court; jury present.)

14 THE COURT: Your opening, Mr. Zupa.

15 MR. ZUPA: Ladies and gentlemen of the jury, this  
16 is a case of seizure of an item sought to be brought into the  
17 United States via the mails. The United States is seeking to  
18 have this item forfeited and destroyed as obscene, pursuant to  
19 a Federal statute.

20 Please remember that this is not a criminal case.  
21 This is a civil case. The United States is seeking to have  
22 an item destroyed pursuant to its power to regular the commerce  
23 of items into the United States. No one is here on trial for  
24 any criminal offense.

25 I urge you to pay close attention to the evidence

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14

2 and to proceed to reach a verdict as fairly as you can.

3 Thank you.

4 THE COURT: Mr. Cherry?

5 MR. CHERRY: Ladies and gentlemen of the jury, as  
6 the judge has told you, I am not a lawyer, and the reason  
7 I come here without a lawyer is that the matter in question  
8 here is one magazine, and it just is not possible, that is to  
9 say, it just doesn't make sense to hire a lawyer over a matter  
10 of one magazine.

11 On the other hand, the Government seizes approximate-  
12 ly fifteen thousand packages every year, and ther has to be  
13 some time, somebody has to go to court just to set a standard,  
14 a reasonable standard.

15 So I felt that I should do this, just so that a  
16 jury, a jury of people rather than some bureaucrafts in the  
17 Customs Authority, should decide this matter.

18 THE COURT: Very well. Please proceed.

19 MR. ZUPA: Your Honor, the Government calls  
20 Vincent Ruisi to the stand.

21 V I N C E N T R U I S I , called as a witness by the  
22 Government, being first duly sworn, testified as  
23 follows:  
24  
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Ruisi - direct

15

2 DIRECT EXAMINATION

3 BY MR. ZUPA:

4 Q Mr. Ruisi, what is your position?

5 A I am employed by the United States Customs Service,  
6 as a work coordinator for that particular group of people.

7 Q Any particular branch of the U. S. Customs?

8 A Imports Compliance Branch.

9 Q What are your duties?

10 A I receive materials referred to our office from  
11 the General Post Office, 32nd Street, in New York City.

12 Q What type of material?

13 A The material comes in bulk, and it is all  
14 suspected of containing obscene material within that partic-  
15 ular shipment for the day.

16 Q Why are these particular materials referred to you?

17 A For possible obscene contents.

18 Q Do you personally make an examination of these  
19 materials?

20 A These materials are referred to our office, and I  
21 personally try to identify the contents by looking at the  
22 country of origin, such as Denmark, Sweden, the Netherlands,  
23 Germany.

24 I try to look at the thickness of the envelope, the  
25 color of the envelope, the return address. These are all

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Ruisi - direct

16

2 familiar to me. Upon deciding whether it is an apparent com-  
3 mercial shipment, I proceed in identifying the contents.

4 Q Well, how do you initially determine if a matter is  
5 obscene when it comes in an envelope via the mails?

6 A By the thickness of it, which would indicate there  
7 might be a magazine within the particular envelope; by the  
8 return address I have seen at prior times; by the handwriting  
9 on it -- sometimes they write -- that they use the same group  
10 of people to address the envelopes. Things of that nature.

11 Experience really helps you identify the particular  
12 groups.

13 Q Once the United States Customs makes a decision to  
14 seize an item, what if any record do you make?

15 A Once we decide that the particular item is possibly  
16 obscene, we proceed in seizing the material and notifying the  
17 named recipient of the actions taken by Customs. We accumu-  
18 late approximately five days of this nature of work and then  
19 prepare a schedule for the U. S. Attorney's office, located  
20 at 1 St. Andrew's Plaza.

21 Q I show you Government Exhibit 1 marked for identi-  
22 fication and ask you if you can identify it.

23 A Yes. This is prepared under my direct supervision.  
24 It is Schedule No. 1350. It was prepared on February 13, 1976.

25 Q Would you refer to page 76, Series No. 1961/213.

MP Ruisi - direct

17

A Yes.

Q And would you identify that for us.

A We have a seizure number, the date of seizure, the date received in Customs, the name and address of the individual it was seized from and the contents found within the mailed item.

Q Whom is that item addressed to?

A It's addressed to a Fred Cherry in Puerto Rico. The contents is "Sexual Instructions from Susan" plus illustrated advertising.

Q Are these schedules prepared in the regular course of business?

A I think they are.

MR. CHERRY: Your Honor --

THE COURT: I will strike the previous answer. The jury will disregard it other than it being addressed to Mr. Cherry, because it is not in evidence yet, and I don't want any of the contents referred to until it is in evidence.

Is there anything else?

MR. ZUPA: The United States offers Government Exhibit 1 for identification into evidence.

THE COURT: The jury will disregard the address, because the only thing that is required here is that the mail be addressed to someone within the United States.

1 MP

Ruisi - direct

18

2 Mr. Cherry, have you any objection to that going  
3 into evidence?

4 MR. CHERRY: Your Honor, I object to it -- well,  
5 I will make my objection -- no, I have no objection to this  
6 going into evidence, but I will make an objection later.

7 THE COURT: Surely. It is received in evidence.

8 (Government Exhibit 1 for identification was re-  
9 ceived in evidence.)

10 THE COURT: All right. Proceed, please.

11 Q I show you Government Exhibit 2 for identification  
12 and ask you if you can identify that.

13 A I am looking at Government's Exhibit 2, "Sexual  
14 Instructions" --

15 THE COURT: No. Is it in evidence?

16 MR. ZUPA: No, your Honor.

17 THE COURT: Please remember that you cannot give us  
18 the detail. Please avoid that, will you? The man has no  
19 lawyer, and I know you aren't taking advantage in any way, but  
20 please wait for the time. Just answer the direct question, and  
21 that is all, until it is in evidence.

22 Will you please try to remember that?

23 THE WITNESS: Yes, sir.

24 MR. ZUPA: If your Honor please, I asked him only  
25 if he could identify it.



1 MP

Ruisi - direct

19

2 A Yes.

3 THE COURT: The answer is yes or no; that's all.

4 A (Continuing) Yes; I can.

5 Q Tell me what relation the seizure number in this  
6 item has to the scheduled item you referred to before.

7 A It coincides with Schedule No. 1961/312.

8 MR. ZUPA: Your Honor, the United States offers  
9 Government Exhibit 2.

10 THE COURT: Do you have any objection to that going  
11 into evidence, Mr. Cherry?

12 MR. CHERRY: As I said before, as we discussed be-  
13 fore, under the stipulation, certain technical matters are for  
14 your Honor.

15 THE COURT: Yes.

16 MR. ZUPA: The appropriate arguments can be made at  
17 a later time.

18 THE COURT: All right. Fine. Then you find that  
19 acceptable?

20 MR. CHERRY: Yes.

21 THE COURT: As long as I rule on that phase of it,  
22 Is that what you mean?

23 MR. CHERRY: Yes.

24 MR. ZUPA: Your Honor, I have no further questions.

25 THE COURT: Do you wish to cross-examine, Mr.

1 MP

Ruisi - cross

20

2 Cherry?

3 MR. CHERRY: Yes, your Honor; I do.

4 THE COURT: You have a right to, of course.

5 CROSS-EXAMINATION

6 BY MR. CHERRY:

7 Q Mr. Ruisi, could you tell me who makes the deter-  
8 mination of what is obscene and what is not obscene?

9 A We have --

10 THE COURT: He just asked a simple question: who,  
11 what office?

12 A (Continuing) The United States Customs staff makes  
13 the decision.

14 Q Yes, but is there any particular individual who has  
15 that authority?

16 A I make some of the decisions.

17 Q Did you ever make decisions involving 35 millimeter  
18 commercial film?

19 A No; I have nothing to do with commercial film.

20 THE COURT: Just say yes or no. Don't make a speech  
21 every time.

22 Q Do you have anything to do with magazines that are  
23 brought in in bulk and not through the mails?

24 A No commercial shipments.

25 Q Just individuals; is that right?

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Ruisi - cross

21

2 A Right.

3 Q Now, may I ask you how you know that you are apply-  
4 ing the same standard that the Customs Bureau is applying to  
5 commercial as well as non-commercial?

6 A I have no idea.

7 MR. CHERRY: That's all.

8 (Witness excused.)

9 THE COURT: Next witness.

10 MR. ZUPA: Your Honor, I have no further witnesses.

11 THE COURT: The Government rests?

12 MR. ZUPA: Yes, your Honor: the Government rests.

13 THE COURT: The defendant moves for a dismissal of  
14 the entire proceedings on the ground that the seizure has  
15 not been justified, and the Court denies that motion.

16 Is there any other motion that you wish to address  
17 to the evidence so far presented?

18 MR. CHERRY: I will have other objections.

19 THE COURT: Have you anything to say to the Court  
20 with regard to what has been presented so far as to why the  
21 Court should throw out the proceedings at this time?

22 MR. CHERRY: No.

23 MR. ZUPA: We ask for a directed verdict on the  
24 fourteen-day requirement. I believe it is for your Honor to  
25 decide. I think it is very clear.

1 MP

Ruisi - cross

22

2 THE COURT: Yes. May I have the necessary material  
3 for me to make that determination? Which one is it?

4 MR. ZUPA: It is Government's Exhibit 2, your Honor,  
5 and I believe the docket sheet will reflect that the United  
6 States commenced this action on February 18th.

7 THE COURT: I uphold the Government on that score.  
8 What else is there?

9 MR. ZUPA: Your Honor, the Government rests at this  
10 time.

11 THE COURT: Now, Mr. Cherry -- stand up, please.

12 MR. CHERRY: I am sorry, your Honor.

13 THE COURT: You have an absolute right to take the  
14 stand, to call witnesses, to present proof of any kind. You  
15 need not do any of that at all. That is for you to decide.

16 Do you wish to testify?

17 MR. CHERRY: I do, your Honor.

18 THE COURT: Do you wish to offer evidence?

19 MR. CHERRY: I do, your Honor.

20 THE COURT: Have any any live witnesses -- by that  
21 I mean human beings -- in court besides yourself?

22 MR. CHERRY: No, your Honor.

23 THE COURT: Very well. You may take the stand.  
24  
25



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2 F R E D C H E R R Y , the Claimant herein, being first  
3 duly sworn, testified as follows:

4 THE COURT: Mr. Cherry, I am sure the Government  
5 will not object if you will talk without waiting for questions.  
6 Just be sure that you stick to the point that is before the  
7 jury.

8 Do you understand that?

9 THE WITNESS: I understand that.

10 THE COURT: Very well. Keep your voice up so they  
11 can hear you.

12 THE WITNESS: Now, ladies and gentlemen of the  
13 jury, the first thing I want to tell you is that this matter  
14 involves one magazine which I am importing solely for my own  
15 use, and it is a magazine for which I sent away to Europe and  
16 for which I sent away an amount of eight dollars; so that as  
17 I explained -- no; I'm not supposed to comment.

18 The second point, the second thing, is that last  
19 autumn I saw a movie that had been imported from Europe. The  
20 name of the picture was "Sensations", and that picture --  
21 everything -- that picture was just as explicit as anything  
22 in the magazine that will be shown to you, and it had all the  
23 sexual activity, every type of sexual activity imaginable. In  
24 fact, there were some types of sexual activity that were not  
25 even in that magazine that will later be shown to you.



1 MP

Cherry

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2 THE COURT: Would you just tell us where that was,  
3 where you saw it?

4 THE WITNESS: I saw it in a movie house called the  
5 Lido East, and that -- that's the name of the theatre: Lido  
6 East.

7 THE COURT: Is it in Manhattan?

8 THE WITNESS: Yes; it's on 59th Street, east of --

9 THE COURT: How long ago was that? About how long  
10 ago was that?

11 THE WITNESS: Either at the end of October or the  
12 beginning of November.

13 I wish to testify that there was a magazine which I  
14 bought in the Times Square area, and I would like to present  
15 that as evidence, as a comparison.

16 MR. ZUPA: Your Honor, the Government objects to  
17 that, because it is our position that the jury is the standard  
18 for the local community standard, and no single piece of  
19 evidence Mr. Cherry might find in the community is applicable  
20 to the issue at hand.

21 THE COURT: Yes. I allowed you to testify about the  
22 movie, because it was out of your mouth before I knew what  
23 you were going to say, but what you saw in a movie and what  
24 you purchased in a magazine anywhere has nothing to do with  
25 the issue presented here, and that is whether the Government

1 MP

Cherry

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2 exhibit which was introduced in evidence, Government Exhibit  
3 2, is obscene -- that particular magazine; not what others  
4 may do, even though it is just as bad or worse or not as bad  
5 or whatever angle you want to approach it by. That would  
6 not really enter into this case. Do you understand that?

7 THE WITNESS: Well, I understand your point.

8 THE COURT: Now, what is it that you offer? What  
9 magazine?

10 THE WITNESS: A magazine which I purchased in the  
11 Times Square area, which was on display --

12 THE COURT: How long ago did you purchase it?

13 THE WITNESS: I purchased it in 1974. However, v  
14 saw it just a couple of weeks ago in that area, in two stores.  
15 In fact, they even had a poster on the wall for it.

16 THE COURT: Fine. Give it to the clerk.

17 Mr. Clerk, will you mark it as Defendant's Exhibit  
18 A for identification.

19 (Defendant's Exhibit A marked for identification.)

20 THE COURT: Now, please show it to the Government,  
21 and I will entertain the Government's position with regard  
22 to it on the record, so that the record will be clear as to  
23 what has happened here.

24 MR. ZUPA: Your Honor wishes me to reiterate the  
25 Government's position?

1 MP

Cherry

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2 THE COURT: Whatever you think you ought to do.  
3 Whatever you want to say, now that you behold it.

4 MR. ZUPA: It is the Government's position that it  
5 is irrelevant to the issue at hand, in determining whether  
6 the particular item Mr. Cherry sent for is obscene. The per-  
7 son or body that is the determining factor of what the local  
8 community standards are is the jury, applying that to the  
9 particular issue, and any particular item is not to be the  
10 determining factor.

11 THE COURT: The Government's position is upheld.  
12 Defendant's Exhibit A for identification is returned to Mr.  
13 Cherry. It will not be admitted.

14 Next?

15 MR. CHERRY: I have nothing further.

16 THE COURT: Cross-examination, if any?

17 MR. ZUPA: No, your Honor, the Government has no  
18 cross-examination.

19 THE COURT: Thank you. You may step down, Mr.  
20 Cherry.

21 (Witness excused.)

22 THE COURT: Mr. Cherry, have you any further  
23 evidence?

24 MR. CHERRY: I have no further evidence, your Honor.

25 THE COURT: Of any kind?

1 MP

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2 MR. CHERRY: No, your Honor.

3 THE COURT: By that do you understand I mean human  
4 beings or inanimate objects?

5 MR. CHERRY: I understand, your Honor. No.

6 THE COURT: Therefore, the defendant has nothing  
7 further, and the defendant rests.

8 MR. CHERRY: Yes, your Honor.

9 THE COURT: What does the Government wish to do at  
10 this time?

11 MR. ZUPA: Your Honor, we would just like to make  
12 a short closing statement.

13 THE COURT: Yes. Do you rest?

14 MR. ZUPA: We do, your Honor.

15 THE COURT: The Government rests, and the defendant  
16 rests. Next is for you to make a motion to dismiss the pro-  
17 ceeding, on the ground that the cause has not been established  
18 as a matter of law and that the case must be dismissed.

19 MR. CHERRY: May I approach the bench?

20 THE COURT: Yes.

21 (At the side bar:)

22 MR. CHERRY: The letter of evidence concerning the  
23 address to which the mail is sent is objected to on the basis  
24 that it never should have gotten into the case.

25 MR. ZUPA: I am sorry, your Honor. It was inadvertent.



1  
2 THE COURT: It wasn't your fault. It was the wit-  
3 ness' loquaciousness. In any event, there was no real harm  
4 done to the defendant by the mere mentioning of it, which I  
5 struck from the record and substituted "mail received or  
6 addressed to anybody within the United States."

7 As to the objection, you have a right to make it,  
8 you are keen, you have a right to make the objection, you  
9 have followed the case with great care, but the motion is  
10 denied.

11 Is there anything else?

12 MR. CHERRY: As I say, under Rule 51, as I understand  
13 it, I have a right to see the charge.

14 THE COURT: You will see it, but right now you are  
15 going to sum up before the Judge charges the jury.

16 MR. CHERRY: The way I understand Rule 51 is that I  
17 should have the opportunity of seeing what you are going to  
18 charge, before I sum up.

19 THE COURT: You are absolutely right.

20 (In open court:)

21 THE COURT: The jury is excused for a few minutes.

22 (The jury left the courtroom.)

23 MR. ZUPA: We have the magazine, which is the sole  
24 exhibit that we have submitted into evidence.

25 THE COURT: Of course.



1 MP

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2 Mr. Cherry wants to see the judge's charge, and  
3 I am handing him five pages -- that does not mean full pages  
4 -- but it is just to have the record clear. They have  
5 been numbered, and there are five.

6 Now, you take your time, Mr. Cherry, and look  
7 that over and let the Government look it over with you, too,  
8 so that you both can tell me if you have any objection.

9 Is that all right, Mr. Cherry?

10 MR. CHERRY: Yes. Yes, your Honor.

11 THE COURT: Take your time.

12 (In the robing room:)

13 THE COURT: You have read what I showed you, Mr.  
14 Cherry?

15 MR. CHERRY: Yes; and may I bring up something else?

16 THE COURT: Not at this time. Let's speak about  
17 this. Is there something wrong with the Court's charge?

18 MR. CHERRY: Yes. The term "prurient interest"  
19 means something else. Originally, it was decided in Roth  
20 versus the United States, 354 United States 387. It is  
21 considered as obscene if, considered as a whole, it appeals  
22 to shameful or morbid interest.

23 THE COURT: And you would like me to put that in  
24 my charge to the jury?

25 MR. CHERRY: Shameful and morbid.

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2 MR. ZUPA: I believe, your Honor, it has been  
3 defined as tending to excite lasciviousness, arousing sexual  
4 desires.

5 THE COURT: Well, you are an expert in the field,  
6 Mr. Zupa. What is wrong with the definition laid down by  
7 the Supreme Court in the Roth case?

8 MR. ZUPA: It has been interpreted somewhat differ-  
9 ently after, your Honor, along the lines of the definition  
10 that was --

11 THE COURT: Have you any objection to the inter-  
12 pretation submitted by Mr. Zupa?

13 MR. CHERRY: I most certainly do.

14 THE COURT: Is there any objection to both of them  
15 going in?

16 MR. ZUPA: No.

17 THE COURT: Mr. Cherry?

18 MR. CHERRY: I don't think so.

19 THE COURT: You don't think you have any objection?

20 MR. CHERRY: No. Excuse me. I don't think I --  
21 I do have an objection. I think you have to state that there  
22 is a difference between an ordinary interest and a morbid or  
23 shameful interest.

24 THE COURT: Well, I could see "or", separating the  
25 two.

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2 MR. CHERRY: I think not, your Honor. I specifical-  
3 ly believe that the Supreme Court defined it in Roth, and I  
4 don't find any other citation, although I looked at every  
5 other citation he had there, where this definition was speci-  
6 idally changed.

7 In all these cases, they mention "prurient inter-  
8 est", but they don't define it specifically.

9 THE COURT: Just give me a minute.

10 (Pause.)

11 THE COURT: I am inclined to go along with the re-  
12 quest that the definition of "prurient interest" in United  
13 States against Roth should be inserted, and I uphold Mr.  
14 Cherry and let it go at that with regard to the word "prurient".  
15 That is what he is asking.

16 Has the Government any objection to that?

17 MR. ZUPA: I think we note our objection to the  
18 fact that U. S. vs. Miller applied a somewhat different  
19 standard than the Roth case, and in that sense we do object  
20 to it.

21 THE COURT: All right. When you say U. S. vs.  
22 Miller, what is the language there?

23 MR. ZUPA: I don't have the case before me, but I  
24 believe that the language we included in our request for jury  
25 instructions was derived from that case.



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32

2 THE COURT: Well, is it set forth in this draft of  
3 the charge to the jury?

4 MR. ZUPA: It is set forth in our jury instructions.  
5 I do not recall seeing it in yours, your Honor.

6 THE COURT: Well, you had better take a look at it.

7 MR. ZUPA: It is not in here, your Honor.

8 THE COURT: And what do you say the case holds?

9 MR. ZUPA: I believe, your Honor --

10 THE COURT: Haven't you got a copy of your requests?

11 MR. ZUPA: Yes; I do.

12 THE COURT: Tell me what it is.

13 MR. ZUPA: U. S. vs. Miller and cases subsequent  
14 to that define "prurient" along those lines as tending to  
15 excite lasciviousness, that is, tending to arouse sexual de-  
16 ires.

17 THE COURT: May I have it, please, and let me have  
18 the Roth case.

19 (Pause.)

20 THE COURT: All right. Now, is there anything else,  
21 Mr. Cherry? I will make up my mind after I have studied this,  
22 looked at both the Miller case and the Roth case. What else  
23 do you have?

24 MR. CHERRY: The term "patently offensive" in the  
25 charge as given in Manual Enterprises vs. Day means something

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2 that is so offensive on its face as to affront current com-  
3 munity standards of decency.

4 THE COURT: All right. That sounds all right.  
5 Do you see anything wrong with that, Mr. Zupa?

6 MR. ZUPA: No, your Honor.

7 THE COURT: All right. Let's have it.

8 (Pause.)

9 THE COURT: Now are you through?

10 MR. CHERRY: No; there is another item at the  
11 end, where the charge says there was no evidence on the point  
12 of whether the material is intended for private use or re-  
13 sale. Now, I gave evidence, and to say there was no evidence  
14 would in effect be calling me a liar. That I object to.

15 THE COURT: I think there is something to that.  
16 Mr. Cherry has a point.

17 MR. ZUPA: Mr. Cherry and I have a suggestion to  
18 make, your Honor: to change "there was no evidence on this  
19 point" to insert "the Government offered no evidence on this  
20 point".

21 MR. CHERRY: All right.

22 THE COURT: Anything else, Mr. Cherry?

23 MR. CHERRY: I would like to state my objection  
24 on the record for the fact that first I was not allowed to  
25 subpoena a witness, and then, on top of that, I was not allowed



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34

2 to show evidence, and between the two items --

3 THE COURT: What do you mean, you were not allowed  
4 to subpoena --

5 MR. CHERRY: Well, I wrote a letter.

6 THE COURT: Well, suppose, Mr. Cherry, we do this.  
7 I will allow you to put your letter in evidence.

8 MR. CHERRY: The point is that I was denied both of  
9 those opportunities. If I had been allowed either one, it  
10 would not have been so bad as to deny me both things.

11 THE COURT: What do you mean by "both"?

12 MR. CHERRY: Well, both the opportunity to question  
13 the person from Customs and the opportunity to bring my  
14 magazine into evidence.

15 THE COURT: Yes; but those are all stated in your  
16 letter.

17 MR. CHERRY: No, no. The fact that I wanted to put  
18 a magazine into evidence was not stated in my letter.

19 THE COURT: Didn't you ask permission to put it in?

20 MR. CHERRY: No. The magazine only came up at the  
21 trial. I didn't mention anything about a magazine until just  
22 now.

23 What I am objecting to, to make it perfectly clear,  
24 is --

25 THE COURT: You mean the magazine that you offered

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2 and I rejected. That is all in the record already. That  
3 has been disposed of, and it is clear that I ruled against  
4 you on that.

5 MR. CHERRY: But here what I am saying is that the  
6 combination of the two things makes the trial so unfair as  
7 to deny me due process.

8 THE COURT: All right. I understand you now. But  
9 have you any objection, in order to complete the record, to  
10 offering into evidence your letter?

11 MR. CHERRY: Fine. I would like to offer that in  
12 evidence.

13 THE COURT: All right. That will be received and  
14 marked in evidence as an exhibit, and we will get it right now,  
15 and then we will allow the Government to put you on notice.  
16 Did you serve him with a copy of your response to his letter?

17 MR. ZUPA: Yes.

18 MR. CHERRY: Two of them, in fact.

19 THE COURT: Bring in all the papers on the bench,  
20 and we will have it marked right now.

21 MR. ZUPA: Would your Honor wish me to mark in  
22 the change that Mr. Cherry suggested?

23 THE COURT: I would appreciate that.

24 There are a couple of papers to mark. Will you  
25 please mark as Defendant's Exhibit B his letter addressed to



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36

2 the Court, which he wishes to put in evidence, and we will  
3 give it to you in just a minute.

4 Is this not the letter and the envelope?

5 MR. CHERRY: Yes, yes. That's the letter and the  
6 envelope.

7 THE COURT: Will you mark that as a defendant's  
8 exhibit, and here is the Government's response. Mr. Cherry,  
9 did you say there were two?

10 MR. ZUPA: I believe, your Honor, he is referring  
11 to the telegram that I sent.

12 MR. CHERRY: No. I was referring to the fact that  
13 he sent me two copies of the same letter.

14 THE COURT: Well, what difference does that make?

15 Then you have two instead of one. You are praising  
16 him. Sometimes you give a person dessert and coffee and a  
17 full meal, and he still complains because you didn't give him  
18 a cigar, and therefore it is not a full meal.

19 Have you any objection to this letter going into  
20 evidence as a Government exhibit? This is as a response to  
21 your letter.

22 MR. CHERRY: Not only do I have no objections, but  
23 I would certainly appreciate the fact that it does into evi-  
24 dence.

25 THE COURT: The Government letter is offered in

1 MP

2 evidence by the Government and received.

3 THE CLERK: The letter is June 8, 1976.

4 (Defendant's Exhibit B for identification was  
5 received in evidence.)

6 (Government's Exhibit 3 was received in evidence.)

7 THE COURT: All right, gentlemen. I thank you for  
8 your frank expressions with regard to what the Court intends  
9 to tell the jury by way of a charge, and I gather, Mr. Zupa,  
10 that you have no objection to the quotation in Roth against  
11 United States, with the distinct understanding that I intend  
12 to include what you yourself put in the requests.

13 MR. ZUPA: That's correct, your Honor.

14 THE COURT: And the objection by the defense to the  
15 Miller language -- and you know what I mean by that, Mr.  
16 Cherry -- stands, and the defendant presses it, but the  
17 Court overrules the opposition of the defendant on that  
18 score, and we shall include in the charge the language in the  
19 Miller case.

20 You understand what I am saying, Mr. Cherry.

21 MR. CHERRY: Well, the language --

22 THE COURT: All I asked you is, do you understand  
23 what I am saying?

24 MR. CHERRY: Can I repeat what you are saying just  
25 to make sure?

MP

38

THE COURT: Yes.

MR. CHERRY: The language he has in his requests.

THE COURT: Precisely. That is the language I am going to use, but I want the record to clearly show that I will include it, and I overrule your objection.

Is there anything else before we call the jury in? Are you satisfied, Mr. Cherry, that you have made your record?

MR. CHERRY: Yes. I have made all my points.

THE COURT: All right. Bring in the jury, please.

(Jury in box.)

THE COURT: The evidence received in this case, members of the jury, will be turned over to you when you leave to deliberate on the issues that are before you. It is that particular evidence that you look at and decide whether or not it is obscene, as I shall define "obscenity" for you.



1 MP

39

2 UNITED STATES OF AMERICA

3 vs.

76 Civ 791

4 VARIOUS ARTICLES OF OBSCENE  
5 MERCHANDISE, Schedule No. 1350

6 June 22, 1976

7 CHARGE OF THE COURT  
8

9 THE COURT: (Cooper, D. J.) Members of the jury,  
10 you understand this case was brought by the Government under  
11 a provision of law that prohibits importing obscene material  
12 into the United States.

13 What does the law say? Let me read to you the per-  
14 tinent parts of the law that is before us. Here it is.

15 "All persons are prohibited from importing into the  
16 United States from any foreign country any obscene  
17 book, pamphlet, paper, writing, advertisement, circular,  
18 print, picture, drawing or other representation, figure  
19 or image on or of paper or other material. No such  
20 article shall be admitted to entry, and all such articles  
21 shall be subject to seizure and forfeiture."

22 That is the law, and the Government contends that  
23 under that law it seized the particular exhibits that are  
24 before you that were received in evidence.

25 In order to find in favor of the Government, you

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2 must find first that the magazine in question was sought to  
3 be imported into the United States from a foreign country.  
4 I don't believe you will have any problem with that: that it  
5 was sent from a foreign country; and, second, that the maga-  
6 zine is obscene -- those two points: first, that it came from  
7 another country, imported into the United States, and,  
8 secondly, that the magazine is obscene within the contempla-  
9 tion of law, and in will define obscenity for you I just a  
10 moment.

11 You must find that the magazine in question was  
12 sought to be imported into the United States from a foreign  
13 country and, second, that the magazine is obscene, by what  
14 we call a preponderance of the evidence.

15 Now, what does that mean: preponderance of the  
16 evidence? It means that the evidence presented is more likely  
17 true than otherwise. It means that those two points that I  
18 have just mentioned must be proved by evidence such as I am  
19 going to illustrate to you.

20 You take a scale, a regular scale, and on one side  
21 you put all the believable evidence, what you believe in favor  
22 of the Government, and then, on the other side, you put all the  
23 believable evidence in favor of the defendant. If the scale  
24 just tips, barely tips in favor of the Government, then the  
25 Government has succeeded in putting in the evidence by what



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41

2 is called a preponderance of proof.

3 If the scales do not tip in favor of the Government,  
4 then you must throw out the case, and the defendant is en-  
5 titled to your verdict. If, of course, it tips in favor of  
6 the defendant, then clearly you throw out the case.

7 So that the amount of evidence, for instance, on  
8 the point of obscenity must be by a preponderance of the  
9 evidence, which means that the scale tips, just slightly tips  
10 in favor of the Government.

11 Is that clear to you?

12 Now, let's go on.

13 As to the first requirement -- and that is that  
14 the magazine in question was sought to be imported into the  
15 United States from a foreign country -- I instruct you that  
16 the articles of merchandise which have been introduced at  
17 trial today were imported into the United States and seized by  
18 authorized agents of the Bureau of Customs within the Port  
19 of New York.

20 As to the second requirement -- and that is the re-  
21 quirement that there be proof by a preponderance of the evi-  
22 dence that the magazine is obscene -- I instruct you that under  
23 the law an article is obscene if you are satisfied as to  
24 three points.

25 1. That the average person, applying contemporary

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42

2 standards would find that the magazine, taken as a  
3 whole, appeals to the prurient interest.

4 Now, what is meant by "prurient interest"? Let  
5 me define that for you. Prurient interest means a shameful  
6 or morbid interest in nudity, sex or excretion and if it  
7 goes substantially beyond customary limits of candor in de-  
8 scription or representation of such matters.

9 I repeat: the words "prurient interest" mean a  
10 shameful or morbid interest in nudity, sex or excretion and  
11 if it goes substantially beyond customary limits of candor  
12 in description or representation of such matters. That is  
13 what is meant by prurient interest.

14 2. The second point that must have been proven  
15 with regard to obscenity is that the work -- that means  
16 the magazine -- contains either a patently offensive or  
17 indecent representation or description of ultimate  
18 sexual acts.

19 I repeat: the second element that is absolutely  
20 imperative in order to make an article or magazine or printed  
21 material obscene is that the work contains a patently offens-  
22 ive or indecent representation or description of ultimate  
23 sexual acts, normal or perverted, actual or simulated.

24 What is meant by "patently offensive"? Just this:  
25 so offensive on its face as to affront current community



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43

2 standards of decency. I repeat: "patently offensive" means so  
3 offensive on its face as to affront current community stand-  
4 ards of decency.

5 With regard to the work that contains either  
6 what I have already said, or patently offensive representations  
7 or descriptions of masturbation, excretory functions and lewd  
8 exhibition of the genitals: let's be very candid about that.  
9 I gave you what (a) is, and I am now giving you what (b) is,  
10 and either one would violate the law.

11 (b) Patently offensive representations or descrip-  
12 tions of masturbation -- and you all know what is meant by  
13 masturbation -- excretory functions -- you know that that  
14 means the secretions that come from the male and female on  
15 sexual contact -- and lewd exhibition of the genitals. That  
16 means a lewd exhibition of the female organ and the male  
17 organ.

18 In this respect, I instruct you that nudity alone  
19 is not enough to make material legally obscene. To be obscene,  
20 the material must contain patently offensive representations  
21 or descriptions of that specific hard-core sexual conduct to  
22 which I have just referred.

23 I repeat: nudity alone is not enough to make  
24 material obscene. To be obscene, the material must contain  
25 patently -- that means clearly on the surface -- offensive



1  
2 representations or descriptions of that specific hard-core  
3 sexual conduct to which I have just referred.

4 Now, what is the third element that must be proven  
5 with regard to the work or the magazine or the printed  
6 material to make it obscene? It is that the work, taken as  
7 a whole, lacks serious literary, artistic, political or  
8 scientific value.

9 I repeat: the final element, the third element, is  
10 that the work, taken as a whole, as you look at it from be-  
11 ginning to end, lacks serious literary, artistic, political  
12 or scientific value.

13 Now, if you find that all three elements are satis-  
14 fied, then the magazine in question is obscene under the law.

15 In making your determination as to whether these  
16 articles are obscene, you should not be concerned by the  
17 fact that there were no witnesses today who testified that the  
18 articles are obscene. The determination of whether these  
19 articles are obscene is for you, the jury, alone to make.  
20 The Government satisfied its burden of proof when it placed  
21 the articles in evidence. These articles are the very best  
22 evidence of what they represent, and testimony by experts is  
23 unnecessary.

24 I should add that the fact that there are others  
25 selling the same kind of material or that there are films

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45

2 being shown has nothing at all to do with what is before you,  
3 and that is whether this material in evidence before you is  
4 obscene. The fact that others may be doing things that may  
5 or may not violate the law has nothing at all to do with you.  
6 The fact that one person, for instance, is charged with  
7 thievery does not excuse it because others are engaged in  
8 thievery, if you understand what I am trying to say to you.  
9 You just look at this material before you in evidence and  
10 ask yourselves: is this obscene within the definition of the  
11 law as the Judge gave us? That is all you have to do, and it  
12 is plenty. I am saying, don't consider anything else.

13 You told me, and I emphasized, before you were  
14 sworn that you would base your judgment only on the evidence  
15 before you, not what was presented somewhere else, but just  
16 the evidence before you: is it obscene? Is it not? That is  
17 for you to decide under the law of obscenity as I have given  
18 it to you, as you must apply the law. You can't just choose  
19 your own law. This is the law of obscenity that you must  
20 apply under your oath to the evidence that you are going to  
21 examine.

22 Finally, you should not be concerned, either, as to  
23 whether Mr. Cherry intended these articles for his private  
24 use or for commercial resale. You may have noted that the  
25 Government offered no evidence as to how the claimant, Mr.

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2 Cherry, intended to use these articles. The Government  
3 offered no evidence on this point, because how the articles  
4 were to be used is irrelevant to whether they are obscene  
5 and whether they may enter the United States.

6 The law under which these articles were seized  
7 applies to obscene goods without regard to whether they are  
8 intended for subsequent resale or for the personal use of  
9 the claimant to whom the goods are addressed. You are to  
10 render a verdict on the article that is before you. You are  
11 to apply the test I have given you to that article, regard-  
12 less of whether it is a magazine, a piece of illustrated ad-  
13 vertising or otherwise, regardless of the size, the bulk, the  
14 width, the country of origin, the address of the claimant,  
15 the kind of wrapping paper in which it was mailed. Each  
16 article is to be considered in the light of the test for ob-  
17 scenity that I have given you. I dont know how to make it  
18 any more simple.

19 Now, after you have gone into the jury room, if you  
20 have any question as to the law, write me a note. You are the  
21 forelady. Send me a note: "The jury would like to have you  
22 explain" or "The jury would like this" or "The jury would like  
23 that." You are not to hesitate to do it. You all seem to  
24 nod your heads -- or some of you do -- so that you seem to  
25 understand everything I have said. If when you go in there



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2 you have any doubt about it, don't hesitate to come up and  
3 let me know what is bothering you.

4 All right. Madame Forelady and ladies and gentlemen  
5 of the jury, do you understand?

6 Very well. Where are the exhibits? Send them  
7 right in, all the exhibits. Turn them right over now, in my  
8 presence to the forelady.

9 MR. ZUPA: Your Honor, I believe the schedule con-  
10 tained something that we have stipulated would not be entered  
11 into evidence.

12 THE COURT: Be good enough to tell me what it is  
13 that the Government agrees goes before the jury.

14 MR. ZUPA: Just the magazine, Mr. Cherry?

15 MR. CHERRY: That's right.

16 THE COURT: Let them have it. Exhibit 2. That  
17 is all the jury has to look at. Turn over Exhibit 2 to  
18 the jury.

19 All right, ladies and gentlemen of the jury.

20 MR. CHERRY: Don't we get a chance to sum up to  
21 the jury?

22 THE COURT: Of course you do. I am delighted that  
23 you reminded me. Thank you, Mr. Cherry.

24 We spent so much time on the charge, and especially  
25 because you were unrepresented, that I just neglected to

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48

2 remember that you have a perfect right to sum up to the jury.  
3 You had a right to know what the Judge was going to charge,  
4 and we dealt with that and spent a considerable amount of  
5 time.

6 All right. Thank you, Mr. Cherry. You may sum up,  
7 Mr. Zupa.

8 MR. ZUPA: Ladies and gentlemen of the jury, the  
9 only point I would emphasize is that you, the jury, are the  
10 reservoir of what the community standards are, and applying  
11 the tests that his Honor gave a little while ago, you de-  
12 termine whether that particular article in question is ob-  
13 scene, and only that particular article is the determining  
14 factor, and the other articles that are being sold outside  
15 in the streets are not to be compared with a magazine in  
16 determining or not that is particularly obscene.

17 The only other thing I mentioned is the fact that  
18 whether or not the article was to be used for Mr. Cherry's  
19 personal use or for commercial resale is irrelevant. The  
20 statute provides that the importation of any materials that  
21 are obscene from a foreign country into the United States is  
22 subject to forfeiture and seizure.

23 Thank you very much.

24 THE COURT: Mr. Cherry, you may say whatever you  
25 wish by way of summing up to the jury.



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49

2 MR. CHERRY: Ladies and gentlemen of the jury, I  
3 want to thank you for your patience, and I would like to start  
4 in by reminding you that, as the Judge said, you have to find  
5 that this magazine appeals to a morbid or shameful interest,  
6 as distinguished from a non-morbid or non-shameful interest.

7 Also, you must judge this magazine by the community  
8 standard. This means not what you personally would accept  
9 but what the community as a whole accepts, and may I point out  
10 that if you are not sure of what the community accepts, if  
11 you don't know that, then you can't really make the judgment.

12 As the Judge pointed out, you have to know -- the  
13 preponderance of evidence has to be on the Government's side.

14 I would also like to point out that in cross-  
15 examining the witness for the United States as to what stand-  
16 ards the Government applies, he didn't even know what standard  
17 the Government applies to commercial importations. In other  
18 words, I am saying, there is one standard for private importa-  
19 tions and one standard for commercial importations, and that  
20 is the reason I am coming in here and litigating this matter.

21 Now, as far as commercial importation is concerned,  
22 the questions are: what commercial importations are permitted  
23 into this country? Some films come in and are accepted and  
24 permitted to come in. You members of the jury are assumed to  
25 know what the community standards are. And again, I say if

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2 you don't know what those community standards are, then the  
3 Government has failed to prove its case.

4 Thank you.

5 (At 4:00 p.m., the jury retired to deliberate upon  
6 a verdict.)

7 THE COURT: I thought I would wait and give either  
8 side an opportunity to say anything on the record before the  
9 jury returns.

10 Does the Government wish to say anything?

11 MR. ZUPA: No, your Honor.

12 MR. CHERRY: All I want to say is that I don't  
13 think I have grounds to appeal, which is a compliment to  
14 your Honor.

15 THE COURT: I don't know whether you have or not.  
16 Let's see what the jury does.

17 All right.

18 (Recess.)

19 (At 4:06 p.m.)

20 (Jury present.)

21 (The roll of jurors was called. All answered  
22 present.)

23 THE CLERK: Madam Forelady have you agreed upon a  
24 verdict?

25 THE FORELADY: Yes.

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2 THE CLERK: How do you find?

3 THE FORELADY: Obscene.

4 THE CLERK: Ladies and gentlemen of the jury,  
5 listen to your verdict as it stands recorded. You say you  
6 find the material submitted to you to be obscene, and so  
7 say you all.

8 THE COURT: Poll the jury.

9 (Each juror, upon being asked by the clerk of the  
10 court whether the verdict as recorded was his or her  
11 verdict, responded affirmatively.)

12 THE COURT: Ladies and gentlemen, I just want to say  
13 a word or two before you leave.

14 In the first place, regardless of what you decided,  
15 I would say the same thing, and that is that the Court appre-  
16 ciates the attention, the sense of caring that you demons-  
17 trated, the desire to do what I told you is the obligation  
18 you have as ministers of justice, to examine the evidence and  
19 apply the law to it.

20 It is very meaningful to me, no matter how many  
21 years I have been a Judge, to see jurors match the Judge's  
22 concern that everybody should have a fair trial and that  
23 every case must be considered seriously, the rights of the  
24 Government and the rights of the defendant.

25 You leaned forward during the trial, and your



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2 facial expressions showed that you were deeply concerned,  
3 that you cared, and this, too, I would say, regardless of  
4 the verdict, because the verdict was your business; it was  
5 your responsibility; it was your oath.

6 Others have a perfect right to criticize or dis-  
7 agree with you. That is their right. But yours was the re-  
8 sponsibility.

9 And this is something else I want to leave with  
10 you. You are in a United States Court. You heard the care  
11 and patience that was extended to a person unrepresented by  
12 a lawyer. We hear all kinds of criticism. It's all very  
13 cheap to criticize. But what did you see? You saw a fair  
14 prosecutor, representing the Government, fair but firm. You  
15 saw a defendant who displayed a great deal of evidence, and  
16 you saw the Judge hover over him in an effort to see that all  
17 his rights were fully protected, and that's what goes on  
18 in the Federal system. It's not all bad.

19 Remember this simple example of hours being spent  
20 to see that a fair trial was given to both sides. So next  
21 time people talk about justice, that you have a right to  
22 criticize justice, you have an inalienable right always to  
23 criticize; but don't forget this experience, because we are  
24 always concerned that the facts and the law shall determine  
25 guilt or innocence, no matter who it is: rich, poor, repre-



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53

resented, unrepresented, international figures, successful people, those waiting for success and, as I told you before you took your oath, even the avowed enemies of our country. Each one can have his day in court, and justice shall be rendered on the facts and on the law.

Just like a surgeon, you go in there with sterilized instruments. You do whatever you can. You strain; you worry; you do your utmost, and if the patient can get up off that table in time and walk, you feel great; and if, despite your efforts the patient does not survive, the only consolation that you have is that you have done your utmost, and no less is true about the law.

You have participated in it, and when you leave this courtroom and this courthouse, you can take with you the satisfaction of knowing that you brought to this the best that you had to offer, and that is all any mortal can do.

Thank you, ladies and gentlemen.

(The jury left the courtroom.)

THE COURT: The defendant moves to set aside the verdict as being contrary to the evidence and contrary to the law and renews his motion to dismiss the proceedings on both those grounds.

Each motion is denied.

Are there any additional motions, Mr. Cherry?

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54

2 MR. CHERRY: No, your Honor.

3 THE COURT: Is there anything the Government wishes  
4 to place on the record?

5 MR. ZUPA: One further item, your Honor.

6 There were, as you mentioned before, order blanks in  
7 the envelope with the material which is now determined to be  
8 obscene. The statute says that all articles in with the  
9 obscene materials shall be subject to condemnation.

10 THE COURT: I gave that reflection, and I so direct.  
11 I uphold the Government's position in regard thereto, with  
12 an exception to the defendant.

13 Anything else, Mr. Cherry?

14 MR. CHERRY: No. The point is that this creates a  
15 precedent. Outside, I mentioned to the attorney that as far  
16 as I am concerned, that they could have those, anyhow, be-  
17 cause I didn't like the prices on the brochure, but now there  
18 is a precedent against me for next time.

19 THE COURT: I note your objection to it.

20 Is there anything else?

21 MR. CHERRY: No, your Honor.

22 MR. ZUPA: No.

23 THE COURT: Very well. Thank you, gentlemen.

24 - - -

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62a

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

Plaintiff,

-v-

VARIOUS ARTICLES OF OBSCENE  
MERCHANDISE, SCHEDULE NO. 1350,

Defendant.

-----x

:  
:  
: JUDGMENT

: 76 Civ. 791 ( IBC )  
:  
:

A civil action for the condemnation and forfeiture of the articles contained in Schedule No. 1350 herein having been commenced on February 18, 1976, and a Partial Default Judgment with respect to those Articles for which no claims or answers were filed having been entered on April 7, 1976 and a judgment forfeiting and condemning as obscene those articles as to which claims or answers were filed except Exhibits 7 and 7A as to which Fred Cherry has made claim, having been entered on April 30, 1976, and the trial as to Exhibits 7 and 7A contained in Schedule No. 1350 as to which Fred Cherry has made claim having been adjourned at the request of Fred Cherry from April 12, 1976 to June 22, 1976, and Fred Cherry having waived the requirement that these proceedings be concluded within sixty (60) days after commencement, and a trial by a six-person jury having been held on June 22, 1976 before the Honorable Irving Ben Cooper as to plaintiff's action against Exhibits 7 and 7A claimed by Fred Cherry, and Fred Cherry having consented to the condemnation and forfeiture of Exhibit 7A (except the order forms attached thereto), and the jury having found Exhibit 7 obscene within the meaning of 19 U.S.C. § 1305,

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•VJZ:erw  
:75-0564

NOW, therefore, it is hereby

ORDERED AND DECREED that the defendants Exhibit 7 and 7A, including the order forms contained therein, addressed to claimant Fred Cherry is condemned and forfeited to the plaintiff, and it is further

ORDERED AND DECREED that no sooner than sixty days after the entry of this Judgment, the United States Marshal for the Southern District of New York is directed to destroy the forfeited articles, and it is further

ORDERED AND DECREED that the United States Marshal, after destroying the forfeited articles in accordance with this Judgment, shall make his return according to law.

Dated: New York, New York

June , 1976

---

HONORABLE IRVING BEN COOPER  
United States District Judge

Judgment entered this  
day of June, 1976.

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COPY RECEIVED

*Robert B. Fiske, Jr.*  
UNITED STATES ATTORNEY

*11/20/76*

*Marian L. Bryant*